FIL

Supreme Court of the United States

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

UNITED STATES OF AMERICA

vs.

NICHOLAS A. STIRONE,

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit dismissing petitioner's appeal from a final order and judgment of the United States District Court for the Western District of Pennsylvania for want of jurisdiction.

OPINIONS BELOW

The Opinion of the Court of Appeals is not officially reported. It appears hereinafter as Appendix A. The opinions of the District Court, not yet officially reported, appear as Appendix D and E.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) and Rule 22 (2). The final order and

judgment of the Court of Appeals dismissing the appeal in United States v. Stirone was rendered on January 23, 1961.

QUESTION PRESENTED

Was the denial of petitioner's Motion for Discharge of Defendant and Release of his Bail before trial in which he claims his constitutional rights had been violated an appealable decision under 28 U. S. C. § 1291?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED

1. United States Constitution, Amendment V: * * * that "no person shall be held to answer for a capital, or otherwise infamous crime, unless, on a presentment or indictment of a grand jury * * *"

2. 28 U. S. C. § 1291 provides: "§ 1291. FINAL DECISIONS OF DISTRICTS COURTS. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

The petitioner was prosecuted for unlawful violation of the Hobbs Act.[1] The United States District Court for the Western District of Pennsylvania, *U. S. v. Nicholas A. Stirone*, 168 F. Supp. 490, entered judgment of conviction and defendant appealed. The United States Court of Appeals for the Third Circuit, *U. S. v. Nicholas A. Stirone*, 262 F. 2d 571, affirmed, and the United States Supreme Court granted writ of certiorari on April 27, 1959, *Nicholas A. Stirone, Petitioner, v. U. S.*, 359 U. S. 978, 79 S. Ct. 897. On January 11, 1960, the Supreme Court of the United States reversed the decision of the Circuit Court, *Nicholas A. Stirone, Petitioner, v. U. S.*, 361 U. S. 212, 80 S. Ct. 270. The United States Supreme Court remanded the case to

[1] 18 U.S.C.A. § 1951.

the United States District Court with directions for proceedings in conformity with the opinion of this Court. (Appendix C, *infra*, p. 12.)

Subsequent to the decision of your Honorable Court reversing the conviction, petitioner on October 10, 1960 filed in the District Court a motion for Discharge of Defendant and Release of Bail. (Appendix A, *infra*, p. 10.) The motion reads as follows:

> "1. The Indictment of the Grand Jury having been amended, and there being no new indictment found by a Grand Jury, the present indictment is a nullity, and the Court therefore is without jurisdiction over the person of this defendant, and he is entitled to his discharge, there being no legal indictment of a Grand Jury before the Court. There is no legal indictment as required by the Fifth Amendment which would give the Court jurisdiction over this defendant."

On denial of this motion by the District Court (Appendix E, *infra*, p. 16)[2] petitioner appealed to the Circuit Court of Appeals. The Government filed a motion in the Court of Appeals to docket and dismiss the appeal. On January 23, 1961 the motion to docket and dismiss the appeal was argued before the Circuit Court of Appeals. On the same day the Circuit Court entered its judgment and ordered that the appeal be docketed and dismissed for want of jurisdiction. (Appendix B, *infra*, p. 11.)

---

[2]The District Court in its Order of December 29, 1960 denying petitioner's Motion for Discharge of Defendant and Release of Bail stated that the grounds for relief had previously been considered by the Court in its Memorandum Opinion dated September 29, 1960. (Appendix D, *infra*, p. 13.)

REASONS FOR GRANTING THE WRIT

1. The Issue Here is One of First Impression. It is Important That Your Honorable Court Resolve the Issue Whether a Defendant Has the Right to Appeal an Order of a District Court Under 28 U.S.C. 1291 Denying Him His Constitutional Rights to be Tried under a Valid Indictment of a Grand Jury.

2. The Decision of the Court Below Directly Conflicts With Its Prior Decision in the Case of *U. S. v. Sineiro*, 190 F. 2d 397.

ARGUMENT

In construing 28 U.S.C.A. 1291, which establishes appellate jurisdiction of "final decisions," your Honorable Court in the case of *Stack v. Boyle*, 324 U. S. 1, 72 S. Ct. 1, said:

> "* * * it is a final decision that Congress has made reviewable. 28 U.S.C. § 1291, 28 U.S.C.A. § 1291. While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment. * * *"

Each case where finality is an issue must be determined by the particular circumstances. See *United States v. Wallace & Tiernan Co.*, 336 U. S. 793, 802 (1949) where this Court said:

> "* * * whether a motion and order 'is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances.* * *' "

The petitioner's motion for discharge is not to be construed as a Motion to Dismiss the Indictment as the

government contends.[1] If so, it would clearly be within the purview of 28 U.S.C. § 1291 and must fail.

We submit that in the instant case, the issue raised by the motion was whether the amended indictment was null and void which deprived the District Court of jurisdiction without a new indictment by a Grand Jury. *Ex Parte Bain*, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849.

These matters are entirely independent of the issues to be tried under a Hobbs Act case. 18 U. S. C. A. § 1951 (a).

There is no attempt to have the Appellate Court hear again the Stirone case piecemeal. The occasion for the motion did not arise until after the U. S. Supreme Court had decided that the indictment had been amended by the trial judge. *Nicholas A. Stirone, Petitioner, vs.* United States, 361 U. S. 212, 80 S. Ct. 270. The motion was therefore extraordinary and was not a usual motion made in regular course before trial.

We raise an important and constitutional question by the appeal, and we rely upon the following cited cases for the proposition that the District Court Order was appealable.

In *Cohen v. Beneficial Loan Corporation*, 337 U. S. 541, 69 S. Ct. 122, this Court affirmed the decision of the lower Court upholding the appealability of a District Court Order and laid down the law as follows: (p. 1251 of 69 S. Ct.)

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate

[1]Government's Brief, Page 3, in support of its Motion to Docket and Dismiss the Brief filed in the Court below, states the question to be Argued "Is the refusal of a motion to dismiss an indictment a final order which may be appealed?

consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. * * *

"We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. * * *"

We argue that the District Court Order was a final disposition of the petitioner's claimed right of discharge on constitutional grounds and is not an ingredient of the cause of action (extortion) and does not require consideration with it.

This Court in the case of *Stack v. Boyle, supra*, decided that a motion to reduce bail which was denied by the District Court was appealable. The Learned Justice stated the law to be: (p. 7, 72 S. Ct.)

"* * * it is a final decision that Congress has made reviewable. * * * While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment. The purpose of the finality requirement is to avoid piecemeal disposition of the basic controversy in a single case 'where the result of review will be "to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation * * *"' Cobbledick v. United States, 309 U. S. 323, 326, 60 S. Ct. 540, 542, 84 L. Ed. 783. But an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—* * *"

We find helpful authority in *U. S. v. Sineiro*, 190 F. 2d 397, (3rd Cir.) where the lower court granted the right of appeal under circumstances similar to the instant case and should control here. Succinctly the facts are these: Defendant filed a Motion to Quash a Warrant and Sup-

press a Statement made by him before indictment or information on constitutional grounds. The United States moved to dismiss the appeal under 28 U.S.C. § 1291. It was held that unless review could be had, petitioner would be denied appelate review of his constitutional claims and, therefore, the order was a final order and appealable. In support of its action, the Court said: (p. 400)

> * * * "The critical issue is whether he would be deprived of any appellate review of his constitutional claim if the doctrine of finality were employed to deny the appeal. It is concluded that the answer should be in the affirmative. It is enough to hold that this, being before indictment or information, is an independent proceeding treated as such in the District Court, and that unless review may be had the movant will be denied any appellate review of his constitutional claim. * * *"

The Second Circuit decided in the case of *U. S. v. Foster*, 278 F. 2d 567 that the Order of the District Court refusing defendant permission to depart the jurisdiction after indictment was a final appealable order. Judge Swan in the course of the Opinion has the following to say: (p. 569)

> * * * "But in the rare case where the movant contends that the denial of the motion is an arbitrary exercise of discretion and *violates his constitutional* rights, we believe the order should be appealable. * * *" (emphasis ours)

The District Court's order was conclusive and in an independent proceeding in which Stirone raised a violation of his constitutional rights. *Perlman v. U. S.*, 247 U. S. 7, 38 S. Ct. 417, 62 L. Ed. 950. We urge that the District Court's order has the finality required and petitioner's appeal to the Circuit Court should be heard on the merits now rather than at the end of a costly trial. In *Parr v. U. S.*, 351 U. S. 513, 76 S. Ct. 912, the concept of finality was fully discussed. We do not cite the Parr

case as authority for the proposition here raised because the issues are different. There this Court decided that an appeal from a District Court's order dismissing an indictment on motion of the Government was not appealable under 28 U.S.C. § 1291. The majority of the Court, in a 5-4 decision, contended that even if the dismissal had the requisite finality, petitioner could not appeal it because he was not aggrieved thereby. We do cite the case, however, because Chief Justice Warren in his dissenting opinion used rationale which we feel cogent and applicable to the particular circumstances in the instant case. He said on Page 918 of 76 S. Ct.:

> * * * "It seems to be intimated, however, that Parr might be able to raise the question somehow after trial at Austin if he should be convicted in the new and different case brought there. This Court can write law to that effect. We do not think it should. We countenance plain harassment if we require Parr to be tried under what may turn out to be an invalid indictment of Austin before he can obtain appellate review of dismissal of the Laredo case. * * *"

We can think of no greater aggrievement and violation of petitioner's constitutional claims than to be tried for a violation of the Hobbs Act under an indictment which may turn out to be invalid.

CONCLUSION

For the reasons set forth herein, we respectfully submit that this petition for a writ of certiorari should be granted.

VINCENT M. CASEY

V. J. RICH

Attorneys for Petitioner

Certificate of Service

I certify that I have served by mail upon Solicitor General of the United States, Department of Justice, Washington #5, D. C., five copies of the foregoing Petition for a Writ of Certiorari and that I have served five copies thereof by messenger upon the United States Attorney, Federal Building, Pittsburgh, Pa.

VINCENT M. CASEY,
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
vs.
NICHOLAS A. STIRONE
} Criminal Action No. 14871

MOTION FOR DISCHARGE OF DEFENDANT AND RELEASE OF HIS BAIL

AND NOW comes Nicholas A. Stirone, defendant in the above entitled matter, by his attorneys, Vincent M. Casey and Margiotti & Casey, and moves the Court for the discharge of the defendant and the release of his bail for the following reason:

1. The Indictment of the Grand Jury having been amended, and there being no new indictment found by a Grand Jury, the present indictment is a nullity, and the Court therefore is without jurisdiction over the person of this defendant, and he is entitled to his discharge, there being no legal indictment of a Grand Jury before the Court. There is no legal indictment as required by the Fifth Amendment which would give the Court jurisdiction over this defendant.

MARGIOTTI & CASEY
VINCENT M. CASEY
Attorneys for Defendant

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,504

UNITED STATES OF AMERICA

vs.

NICHOLAS A. STIRONE,

Appellant

Present: GOODRICH, MCLAUGHLIN AND KALODNER,

Circuit Judges

Upon consideration of the motion by appellee to docket and dismiss the appeal in the above case, and of the briefs in support of and in opposition to the motion, and after hearing;

It is O R D E R E D that the case be docketed in this Court, and that the appeal be, and it is hereby dismissed for want of jurisdiction.

By THE COURT,

GOODRICH

Circuit Judge

January 23, 1961

APPENDIX C

IN THE SUPREME COURT
OF THE UNITED STATES

No. 35 October Term, 1959

NICHOLAS A. STIRONE,
Petitioner

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit, this cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Third Circuit and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court that the judgment of the said United States Court of Appeals, in this cause, be; and the same is hereby reversed; and that this cause be and the same is hereby remanded to the United States District Court for the Western District of Pennsylvania for proceedings in conformity with the opinion of this court.

January 11, 1960

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
vs.
NICHOLAS A. STIRONE
} Criminal Action No. 14871

MEMORANDUM OPINION AND ORDER

MILLER, District Judge

Following reversal by the Supreme Court, *Stirone v. United States*, 361 U. S. 212 (1960), of his conviction for a violation of the Hobbs Act, defendant moves for dismissal of the indictment* on the following grounds:

> "1. The defendant has already been in jeopardy for the crime charged in this indictment, and to try him again would be to place said defendant in double jeopardy in violation of the Fifth Amendment of the United States Constitution.
>
> "2. The Supreme Court of the United States, having reversed the judgment of the Court of Appeals for the Third Circuit, the case is terminated."

Specifically, defendant contends that the reversal by the Supreme Court without directions terminates the prosecution. While somewhat related, each issue will be treated apart from the other.

The recent decision of the Supreme Court in *Forman v. United States*, 361 U. S. 416 (1960) completely disposes of defendant's first contention. There the Court said:

---

*Defendant has also filed a Motion to Exonerate defendant and his Surety and Release of Bail.

> "It is elementary in our law that a person can be tried a second time for an offense when his prior conviction for that same offense has been set aside by his appeal. *United States v. Ball*, 163 U. S. 662, 672 (1896). See also *Green v. United States*, 355 U. S. 184, 189 (1957) . . . ." *Id.* at 425.

Moreover, the Court made it absolutely clear that double jeopardy is not involved even where a new trial is not requested.

The crux of defendant's argument evolves about the effect of the reversal by the Supreme Court without further directions. It has been held by other federal courts that "[a] reversal of a conviction without an express direction for the dismissal of the indictment does not dispose of the indictment finally but leaves it open and pending. See *United States v. Ball*, 163 U. S. 662." *United States v. Reina*, 172 F. Supp. 113, 115-116 (S.D. N. Y. 1959); *Spriggs v. United States*, 225 F. 2d 865 (9th Cir. 1955). With this statement, the court agrees. Defendant was not acquitted by either the jury or the court. He was not discharged by the Court of Appeals. The Supreme Court agreed that under the evidence the jury could have found that commerce in sand was obstructed by defendant's extortion. The Court reversed, however, only "because of the court's admission of evidence and under its charge this [obstruction of commerce in steel] might have been the basis upon which the jury convicted petitioner." *Stirone v. United States*, 361 U. S. at 219.

The Supreme Court was at liberty to direct the entry of a judgment of acquittal or direct the dismissal of the indictment. 28 U.S.C. § 2106. It chose to do neither, but rather, by its judgment, "remanded to the United States District Court for the Western District of Pennsylvania *for proceedings in conformity with the opinion of this Court.*" (Emphasis added.)

Accordingly, defendant's motions will be denied.

ORDER

AND NOW, this 29th day of September, 1960, it is ORDERED and DIRECTED that defendant's Motion to Dismiss Indictment and Motion to Exonerate Defendant and his Surety and Release of Bail be and the same hereby are denied.

/s/ JOHN L. MILLER
United States District Judge

CC: VINCENT M. CASEY, *Esq.*

HONORABLE HUBERT I. TEITELBAUM

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
vs.
NICHOLAS A. STIRONE
} Criminal Action No. 14871

ORDER

NOW, this 29th day of December, 1960, it appearing that the grounds for relief alleged in defendant's Motion for Discharge of Defendant and Release of Bail have previously been considered by the court in its Memorandum Opinion dated September 29, 1960, it is ORDERED and DIRECTED that said Motion be and the same hereby is denied.

/s/ JOHN L. MILLER
United States District Judge

CC: VINCENT M. CASEY, *Esq.*
DANIEL J. SNYDER, *Esq.*
Assistant United States Attorney

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JAMES R. BROWNING, Clerk

No. 744

In the Supreme Court of the United States

OCTOBER TERM, 1960

NICHOLAS A. STIRONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 744

NICHOLAS A. STIRONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals dismissing the appeal for want of jurisdiction (Pet. 11; R. 37) is not reported. The opinion of the district court (Pet. 13–14; R. 9–11) is not reported.

JURISDICTION

The order of the court of appeals was entered January 23, 1961 (R. 37). The petition for a writ of certiorari was filed February 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the denial of a motion to discharge a defendant, based upon a claim that the indictment was

amended and was therefore a nullity, is appealable before trial.

STATUTE INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT

On January 11, 1960, this Court reversed the decision of the court of appeals in *Stirone* v. *United States*, and remanded the cause to the United States District Court for the Western District of Pennsylvania for proceedings in conformity with this Court's opinion (R. 2; Pet. 12; 361 U.S. 212). On March 16, 1960, petitioner filed a motion to dismiss the indictment, based, in part, on the ground that since this Court had reversed the judgment of the court of appeals, "the case is terminated" (R. 3, 8).

The district judge denied the motion on September 29, 1960 (R. 12; Pet. 15). The Court filed a memorandum opinion pointing out that this Court had agreed that the evidence at the original trial was sufficient to support a conviction for the crime charged in the indictment; that it had reversed the original conviction only because the case had been submitted to the jury with an alternative instruction which would

have permitted conviction on a theory not charged in the indictment; and accordingly that it had not directed dismissal of the indictment, but merely remanded the case for further proceedings (R. 9–11; Pet. 13–14).

On October 10, 1960, petitioner filed another motion—"for discharge of defendant and release of his bail" (R. 13; Pet. 10). He alleged that the indictment had been "amended" and that, since no new indictment was returned, the old indictment was a nullity (R. 13). On December 29, 1960, the district judge denied the motion, stating that the grounds for relief alleged had been previously considered in its memorandum of September 29, 1960 (R. 14; Pet. 16).

On January 5, 1961, petitioner filed a notice of appeal from the order of December 29 (R. 15). The government moved to docket and dismiss the appeal on the ground that the order was not a final decision of the district court under 28 U.S.C. 1291, and therefore the court of appeals had no judisdiction (R. 1–15). On January 23, 1961, the court of appeals ordered the case docketed and the appeal dismissed for want of jurisdiction (R. 37; Pet. 11).

ARGUMENT

The court below properly dismissed the appeal from the denial of petitioner's pretrial motion for

discharge.[1] Merely labeling the motion as one for "discharge" does not make it anything other than a motion to dismiss the indictment, which is interlocutory and not appealable. Objection to the ruling can be preserved and reviewed upon appeal from the final conviction, if any. The motion is not independent of the main case, cf. *Stack* v. *Boyle*, 342 U.S. 1, but is one where review will halt the orderly progress of the cause. *Cobbledick* v. *United States*, 309 U.S. 323, 327. Consequently the ruling on this motion is not a "final decision" within 28 U.S.C. 1291, and the appeal was properly dismissed for want of jurisdiction.

Petitioner' reliance on *United States* v. *Sineiro*, 190 F. 2d 397 (C.A. 3), is inapposite (Pet. 6-7). Aside from the fact that it is a prior decision of the same circuit, *Sineiro* involved a proceeding brought prior to indictment and thus independent of the main proceeding. *Parlman* v. *United States*, 247 247 U.S. 7; *Go-Bart Co.* v. *United States*, 282 U.S.

[1] The theory of the motion is that this Court decided in *Stirone* v. *United States*, 361 U.S. 212, that the indictment had been "amended" (Pet. 5). That theory is without substance. This Court decided that the erroneous admission of evidence and the charge to the jury created a possibility that petitioner might have been convicted on a charge not found by a grand jury—*i.e.*, that there was a variance between the indictment and the charge to the jury. That ruling does not preclude retrial on the charge actually returned. The pending indictment has not been amended and is in the exact form as returned by the grand jury. Cf. *Ex Parte Bain*, 121 U.S. 1. That is the charge to be tried.

344, 356. Petitioner's motion is after indictment and clearly in the main criminal case.[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

MARCH 1961.

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[2] The practice of reformulating a motion upon which the court has previously ruled is clearly in violation of the spirit of Rule 12(b), F.R. Crim. P. By this tactic petitioner obtained a second order and, in effect, illegally extended his time to appeal. That is a further ground for dismissal for want of jurisdiction.

U. S. GOVERNMENT PRINTING OFFICE: 1961